

R.D. # 0004-99
Woodbridge, N.J.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

BETH ISRAEL CEMETERY ASSOCIATION¹

Employer

and

CASE 22-RC-11713

**TEAMSTERS UNION LOCAL 102, A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ Briefs submitted by the parties have been fully considered. It is noted that the Petitioner presented a closing argument at the hearing in lieu of a formal brief.

2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.⁴
3. The labor organization involved claims to represent certain employees of the Employer.⁵
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time maintenance employees, including groundskeepers, mechanics and mausoleum maintenance employees, foremen and seasonal cemetery workers employed by the Employer at its Woodbridge, New Jersey location, excluding all office clerical employees, sales employees, managerial employees, guards and supervisors as defined in the Act and all other employees.⁶

The parties are in agreement that the appropriate unit in this matter should include all full-time and regular part-time maintenance employees, including groundskeepers, mechanics and mausoleum maintenance employees. Likewise, they agree that all office clerical employees, sales employees, managerial employees, guards and supervisors as defined in the Act should be excluded. At issue is the supervisory status of 7 working foremen, whom the Petitioner, contrary to the Employer, asserts are supervisors within

⁴ The Employer is engaged in the operation of a cemetery in Woodbridge, New Jersey, its only facility involved herein.

⁵ The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁶ There are approximately 50 employees in the unit.

the meaning of the Act and should be excluded from the unit.⁷ Also at issue is the status of approximately 20 “seasonal” employees whom the Employer, contrary to the Petitioner, asserts exhibit a pattern of recurring employment and share a sufficient community of interest with other unit employees warranting their inclusion in the collective bargaining unit. There is no history of collective bargaining for any employees employed at this facility.

The record reveals that the Employer operates its cemetery on a year round basis utilizing a permanent complement of approximately 26 to 27 full-time, year round employees which includes 6 foremen. They are engaged in interments, entombments, unveilings, monument work and maintenance work. During April of each year, the Employer hires approximately 20 to 25 so called seasonal employees that work until sometime in October and are laid off. These employees are engaged in maintenance functions including hedge and grass cutting, grounds maintenance and other cemetery functions.

FOREMEN

The record reveals that Paul DeLeo, Grounds Superintendent, has day to day responsibility for the operations of the cemetery.⁸ DeLeo reports to John Mazar, Regional Director of Construction and Development. There are approximately 8 to 9 burials per day. An interment and/or entombment crew of 3 to 4 employees, generally including a foreman, handle each burial. As the record discloses that the duties of the foremen are similar, they will be discussed herein as a class rather than as individuals.

⁷ The parties stipulated that 2 other working foremen, Roger Kapp and Luis Soto, are not statutory supervisors and, therefore should be included in the unit.

⁸ The parties stipulated and, I find, that DeLeo is a supervisor within the meaning of the Act.

The record reveals that foremen do not possess the authority to hire, fire, transfer, layoff or recall employees, nor to recommend such actions. Further, there is no evidence that foremen are involved in the hiring process by interviewing employees, recommend promotions or raises or have authority to grant time off to employees. Foremen do not schedule employees for work or determine their hours; they do not have authority to assign over time, resolve employee grievances or discipline employees. The record reveals that work assignments are made by DeLeo at a daily meeting attended by all employees in the garage area. At this meeting, DeLeo determines how many and which employees are to be assigned to a particular function. With regard to evaluations, it is undisputed that foremen may provide input as to employee performance when requested by DeLeo. All input as well as evaluations are performed orally. The record does not indicate the frequency of DeLeo's requests for input from foremen. However, there is no evidence that foremen provide any recommendations for promotions, raises or other actions. The record reveals that foremen, as other employees, may report employee misconduct to DeLeo for consideration. There is no evidence that foremen make any recommendations as to disciplinary matters. An incident described in the record concerning an employee, John Francen, occurring in or about March 1999, revealed that foreman, Jean Urbanik, merely reported alleged misconduct by Francen as it related to herself. There is no evidence that Urbanik made any recommendations. The record further discloses that DeLeo independently investigates allegations of misconduct and then determines discipline himself or in consultation with his superior, John Mazar.

The Petitioner relies on several factors to support its assertion that foremen are statutory supervisors. In this regard, it asserts that 6 of the 7 foremen at issue here do not wear green uniforms like other employees but rather wear either white shirts or brown

hooded sweatshirts and brown pants. It acknowledges that one foreman wears a green uniform like other employees. Further, Petitioner contends that foreman have contact with customers in that they escort families into the cemetery and answer questions posed by family members. In addition, foremen perform some duties not performed by other unit employees such as marking out or measuring out of grave sites as this entails a certain level of expertise only possessed by foremen. Finally, Petitioner asserts that foremen generally are higher paid than other employees. In this regard, the record reveals that foremen rates range from \$11.81 to \$17.79 per hour whereas other employees receive wages in the range of \$5.50 to \$17.23 per hour. At least 11 employees have a higher wage rate than the lowest paid foreman. The record attributes higher wage rates to foremen based on their length of service, greater expertise and additional paperwork functions that they, unlike other employees, have responsibility to complete.

The record reveals that foremen like all other year round employees receive time and a half for over time, share the same benefits package, namely a 401(k) retirement plan, medical, pharmacy and dental benefits, paid vacations and holidays. All employees are subject to the identical attendance policies. The record discloses that foremen work in crews together with other unit employees, spend a significant amount of their work time performing the same physical tasks as all other unit employees, such as lifting caskets, setting monuments, cleaning and maintaining the grounds and performing other tasks as needed.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the

foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held, "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id.* at 724 citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The legislative history instructs the Board not to construe supervisory status too broadly because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital*, *supra*, 320 NLRB at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform those functions with independent judgment, as opposed to in a routine or clerical manner. *Bay Area-Los Angeles Express*, *supra* at 1073 and cases cited therein. The burden of proving supervisory status rests on the party contending that status. *Midland Transportation Co.*, 304 NLRB 4 (1991); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.*, 308 NLRB 101, 102 (1992)(citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990)(quoting *Phelps Community Medical*

Center, 295 NLRB 486, 490 (1989)). It is well established that an employee's title, standing alone is not indicative of supervisory status for purposes of the Act. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987). The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service*, 384 F. 2d 143, 151(5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Based upon the above, and the record as a whole, noting that foremen share similar terms and conditions of employment as other unit employees, and the absence of probative evidence that they possess the independent authority to hire, fire, discipline or grant time off to employees, I find that they do not possess any indicia of supervisory status that would warrant their exclusion from the unit. *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); see also *Browning Ferris, Inc.* 275 NLRB 292(1985). It is the Petitioner's burden to prove that the foremen are supervisors as defined by the Act, and the Petitioner has failed to meet this burden. I therefore conclude that the foremen are not supervisors and, therefore, they will be included in the unit found appropriate herein.⁹

SEASONALS

The Employer contends that its seasonal employees exhibit a pattern of recurring employment over the years and share a community of interest with its regular year round employees and as a result, should not be excluded from the petitioned-for unit as urged

⁹ The Petitioner's reliance on *Rosehill Cemetery Assn.*, 281 NLRB 425 (1986) is misplaced as there is no discussion in that matter as to the functions of interment supervisors who were excluded from the unit based upon a stipulated election agreement.

by the Petitioner. The Employer employs seasonal employees each year during the months of April to October. These employees are hired primarily because of the increased work load during that period of time. In this connection, foundations can not be installed during the cold weather months because of ground frost and wetness. Grass cutting, seeding, pruning and planting work is performed during the April to October time frame. In addition, the number of unveilings increases during this period as a result of the difficulty of placing headstones during cold weather periods. It is undisputed that the April to October season is the busiest, and there is a recurring need for increased staff around the same time every year. During the 1998 season, the Employer utilized approximately 25 seasonals. The Employer maintains that these seasonal employees enjoy a reasonable expectation of re-employment from one season to the next, perform similar job duties as its regular employees, and that given these factors, these seasonal employees share a community of interest and should be included in the bargaining unit. The Petitioner, for its part, argues that seasonal employees lack the requisite community of interest to warrant their inclusion in the bargaining unit.

The record reveals that year round employees as well as seasonal employees work from 7:30 am to 4:00 pm, punch the same time clock, share the same breaks and lunch periods and have use of a cafeteria lounge area. The seasonal employees, like year round employees, are eligible for vacation and paid holidays after 30 days of employment. At least 5 seasonal employees have met eligibility requirements and participate in the Employer's 401(k) plan.¹⁰ The record reveals that seasonal employees do not receive health benefits as do the year round employees. Both year round and seasonal employees share similar job duties and are supervised by the same individual. In this regard,

seasonal employees work on interment crews and foundation work, as needed. The record reveals that 5 of the Employer's current year round complement were initially seasonal employees. In these circumstances, I find that the above evidence establishes sufficient factors indicating that seasonal employees share a community of interest with regular employees in regard to wages, hours and working conditions at the Employer's facility. *Kelly Bros. Nurseries, 140 NLRB 82 (1962)*. While it is true that regular employees generally earn higher wages and receive health benefits not granted to seasonals, it is not unexpected that regular employees would enjoy such benefits over seasonal employees.

When dealing with seasonal employees, however, the Board's inquiry does not stop at examining the community of interest between seasonal and regular employees. Seasonal employees are included with regular, year-round employees in a unit appropriate for collective bargaining only when it can be shown that the seasonal employees have a reasonable expectation of substantial seasonal employment from year to year. *L & B Cooling, 267 NLRB 1 (1983)*; *Millbrook, Inc., 204 NLRB 1148 (1973)*. The Board examines such factors as the stability of the employer's demand for and dependency on seasonal employees, the employer's recall policy and re-employment practices, and the size of the labor pool for seasonal work. *Main Apple Growers, Inc., 254 NLRB 501 (1981)*. In the instant matter, the record shows the Employer contacts the previous year's seasonal employees in or about March. In this regard, the former employees are advised of their anticipated rehire date as well as pre-start date period for processing of necessary paperwork. *Bogus Basin Recreation Assn., 212 NLRB 833 (1974)*. The record shows that of 25 seasonals employed through 1998, 20 returned from

¹⁰ The record is silent as to the eligibility requirements necessary to participate in this plan.

the previous year. Of these 20, 1 has been a seasonal since 1982, 1 since 1989, 1 since 1991, 1 since 1992, 3 since 1993, 5 since 1994, 6 since 1995, and 2 since 1997. The record reveals that in October of each year, the Employer provides its seasonal employees with a memo indicating the estimated return to work date for the following season.¹¹ This memo also requests employees to forward to the Employer any changes of addresses or telephone numbers. In these circumstances, I find that the seasonals have a reasonable expectation of being recalled for seasonal employment and should therefore be included in the appropriate bargaining unit. *Main Apple Growers, Inc., supra; Freeman Loader Corp., 127 NLRB 514 (1960)*.

DIRECTION OF ELECTION¹²

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote

¹¹ For example, the October 6, 1998, memo stated that “the estimated return to work date for next year (1999) is April 12th, 1999.”

¹² As the unit found appropriate is larger than that requested, the Petitioner is accorded a period of 14 days in which to submit the requisite showing of interest to support an election. In the event the Petitioner does not wish to proceed to an election it may withdraw its petition without prejudice by notice to the undersigned within seven (7) days from the date of this Decision and Direction of Election. *Folger Coffee, 250 NLRB 1 (1980)*.

if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Teamsters Union Local 102, a/w International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).* Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility, 315 NLRB 359 (1994).* In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102-3110, on or before April 22, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by April 29, 1999.

Signed at Newark, New Jersey this 15th day of April 1999.

/s/William A. Pascarell

William A. Pascarell, Regional Director
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